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EX PARTE

Filed electronically via ECFS

April 27, 2007

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: *In the Matter of Payphone Access Line Rates* - CC Docket No. 96-128

Dear Ms. Dortch:

On April 27, 2007, Melissa Newman, Bob McKenna and Lynn Starr, all of Qwest, met with Scott Deutchman, Legal Advisor to Commissioner Jonathan Adelstein, to discuss the above-captioned proceeding.

The attached document was used as a basis for our discussion. In the document, Qwest's comments on the payphone industry's arguments are shown in italics.

This *ex parte* is being filed electronically pursuant to 47 C.F.R. §§ 1.49(f) and 1.1206(b).

Sincerely,

/s/ Lynn Starr

Attachment

Copy via email to:
Scott Deutchman

In the Matter of Payphone Access Line Rates, CC Docket No. 96-128

April 27, 2007

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QWEST'S RESPONSE TO THE PAYPHONE PROVIDERS' ARGUMENT THAT:

BELL COMPANIES MUST BE ORDERED TO REFUND PAYPHONE LINE CHARGES IN EXCESS OF NEW SERVICES TEST COMPLIANT RATES

Qwest Comments in Red Italics Throughout

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BACKGROUND

- Section 276 of the 1996 Act prohibited Bell Operating Companies (BOCs) from discriminating in favor of their own payphone operations and against independent providers.

  This is true. The new services test is a flexible test based on forward looking costs.

- To prevent discrimination, the FCC in 1997 required the BOCs to conform state-tariffed payphone line rates to the federal "New Services Test' ("NST") adopted in the Computer III proceeding.

  This is true but incomplete. The Commission originally required the filing of interstate tariffs, subject to the full panoply of protections in the Communications Act. On reconsideration it decided to adopt guidelines for state tariffs for payphone access lines. It was recognized that states would and could apply their own forward looking cost methodologies to payphone access line tariffs in their jurisdictions.

- The FCC made NST compliance a condition of the BOCs' eligibility to receive dial-around compensation for their own payphones.

  This is true. BOCs were required to certify to carriers that their payphone rates were complaint with the FCC's rules in order to collect per call compensation.

- The deadline for BOC compliance was set for April 1997.

  This is true. BOCs were required to either have their intrastate payphone rates in compliance with the FCC's rules by April of 1997, or, if they could not meet this deadline, to agree to provide a true-up for their new rates (if lower than existing rates) back to April 15, 1997. Qwest met the earlier deadline and did not need to true up any rates.

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BACKGROUND (continued)

- The determination of whether specific rate proposals complied with the NST was left up to the states by the FCC, with the Commission explicitly preserving its jurisdiction to determine BOC compliance.

  This implies that the FCC reserved the right to intervene in or review state tariffed rates, state ratemaking processes, or state practices. This statement is false. The FCC reserved the right to outline mandatory guidelines for state ratemaking (although the guidelines left much room for state flexibility), and these guidelines were to be implemented by the states in accordance with their own laws, subject to their own appellate processes.

- Prior to the deadline, the BOCs applied for and received a waiver of the new rules to allow them to begin collecting dial-around compensation before complying with the NST.

  This is not true for Qwest. All of Qwest's payphone access rates met the new services test prior to April of 1997, and Qwest did not rely on the waiver.

- The BOCs promised to pay refunds if their rates were found to be excessive, and the Commission expressly conditioned the waiver on payment of refunds.

  This is not true in any respect. The BOCs that relied on the waiver (and Qwest was not one of them) promised to true up any differential owed to customers if the new payphone rate taking effect up to 45 days after April 15, 1997 was lower than the existing rate. If the new rate was higher than the existing rate, no further action was allowed. The use of the phrase "the new tariffs" in the Waiver Order makes this clear.

- Rather than providing the required cost based rates, the BOCs between 1997 and 2002 engaged in vigorous efforts in state commissions and courts (and before the Commission) to avoid, minimize and delay compliance.

  This is not only factually false; it is grossly insulting to state regulators and courts. In Qwest's experience these administrative and judicial bodies took their obligations to conduct rate reviews and proceedings in accordance with the new services test very seriously. Rather than attempt to delay proceedings, Qwest's payphone access line rates have always been compliant with the FCC's guidelines and state law. In those instances where a state regulator found that adjustments needed to be made to comply with the new services test, these adjustments were made (including refunds).

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BACKGROUND (continued)

- In January 2002, in order to address the disparity of tariff proceedings around the country, the FCC issued additional guidance to the states, but did not address the question of refunds.

  This is a misleading statement. The January 2002 Wisconsin Order involved a very specific rate proceeding, not a rulemaking. The Wisconsin Commission had declined to exercise jurisdiction, and accordingly Wisconsin Bell would have been required to file a federal tariff. The FCC acted on an application for review of a Bureau Order that established how the FCC wanted a carrier to defend its federal rates when the state declined jurisdiction. On review, the FCC went beyond the original proceeding and issued guidelines to assist state commissions, and returned the case to Wisconsin on the assumption that the new guidelines would assist the Wisconsin Commission in reviewing new intrastate tariffs. The Commission noted that the guidance given to the Wisconsin Commission would also assist other state commissions in future rate proceedings. The Commission obviously did not "address the question of refunds" because it would have been inappropriate to do so. Had Wisconsin chosen to return the tariff to the FCC one more time, refunds could have been ordered if the processes of Section 204 of the Act were followed. Had Wisconsin chosen to keep the tariff and apply its own law (which it ultimately did), Wisconsin law would govern the question of refunds.

BACKGROUND (continued)

- Most states ultimately found the Bell rates to be noncompliant with the NST and ordered rate reductions, exceeding 50% in most cases.

  This is not true in the case of Qwest. Qwest's rates were generally found to be compliant with the new services test. It is true that, when the Wisconsin Order was released in 2002, Qwest reviewed its payphone access line rates and made appropriate adjustments.

- States varied widely on whether independent payphone service providers ("PSPs") should be granted refunds.

  This is not only true but necessary and appropriate under the federal scheme that the FCC implemented. The FCC did not have the power to preempt state ratemaking authority or state filed tariff rules, nor did it even remotely purport to do so. At the very least such a massive intrusion into state jurisdiction would have been explicit and would have required a detailed analysis.

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CURRENT PROCEEDINGS

- Beginning in July 2004, six state and regional payphone associations filed petitions (Illinois, New York, Massachusetts, Florida, Ohio and Mississippi) requesting the FCC to order refunds.

  This appears to be true.

- The Oregon PUC, the Massachusetts appellate court, and the US Ninth Circuit Court of Appeals have sought guidance from the FCC on whether refunds are appropriate.

  The Oregon PUC sent a letter to the FCC requesting guidance from the FCC on the meaning of the Waiver Order. The Ninth Circuit did not seek guidance from the FCC. Instead the Ninth Circuit remanded the case to the district court with instructions to seek primary jurisdiction from the FCC on the nature of the "waiver" filed by the BOCs. As noted, this waiver did not apply to Qwest because its rates already complied with the new services test.

- Some petitions have been pending for more than two-and-a-half years.

  This appears to be true.

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REFUNDS ARE NECESSARY TO MAKE PSPS WHOLE, SUPPORT PAYPHONE DEPLOYMENT, AND MAINTAIN THE INTEGRITY OF THE FCC PROCESSES

- PSPs were to be charged cost-based payphone line rates as of April 1997.

  Qwest has charged payphone service providers costs based rates since prior to April 1997.
- Excessive charges borne by independent payphone operators have accelerated removal of payphones.

  Qwest's charges have not been excessive or discriminatory. Qwest submits that cellular telephony and text messaging have accelerated the removal of payphones.
- As the BOCs continue to exit this business, independent payphone operators are taking on the majority of responsibility for providing payphone services for the American public.

  Qwest agrees that payphones continue to play an important, although substantially diminished, role in American telecommunications. This does not provide any support for the payphone providers' efforts to obtain unlawful "refunds" from BOCs.
- The BOCs have collected dial-around compensation for ten years while evading compliance with their eligibility conditions.

  Qwest has never evaded compliance with its eligibility conditions. Indeed, its certification of compliance was challenged by AT&T and MCI. The FCC rejected the challenge.

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THE COMMISSION MUST ORDER THE BOCS TO PAY REFUNDS

- It is the FCC's responsibility to ensure a remedy for BOC violations of Section 276 and the federal NST.

  The FCC did provide for such a remedy when it delegated this authority to state regulators and courts. There is no federal remedy that could be lawfully imposed retroactively at this time.
- The FCC had a mandate to ensure that payphone line rates were nondiscriminatory effective April 1997. The only remedy that can undo the BOCs' years of noncompliance is payment of refunds.

  There is no evidence of discrimination, and Qwest did not discriminate. State regulators were charged with preventing such unlawful discrimination in payphone rates.

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THE COMMISSION MUST ORDER THE BOCS TO PAY REFUNDS

- Under *USTA II*, the Commission could use state commissions as "short-cuts" to ensure BOC compliance only if state commissions are "superintended by the [Commission] in every respect."

  The payphone providers here argue that, if the FCC did not reserve the right to micromanage state tariff proceedings in its delegation to state regulators of the authority and obligation to supervise RBOC compliance with Section 276 of the Act, the payphone orders might have been illegal under the USTA II decision. The payphone orders never pretended to reserve this type of supervisory authority over state regulators, a fact made absolutely clear from the Wisconsin Orders and the appellate proceeding concerning them. It is far too late for the payphone providers to challenge the lawfulness of the enforcement structure adopted by the FCC for dealing with payphone access line rates. But even a cursory reading of the Wisconsin Orders demonstrates conclusively that the FCC did not establish a regulatory regime that "superintended state regulation in every respect." Indeed, for such a novel and legally controversial regulatory structure to be enacted, the FCC would have needed to give detailed notice of exactly what it intended. To the contrary, the FCC made it perfectly plain that state costing principles and state enforcement mechanisms (including enforcement by state judicial officials where appropriate) would provide the means of ensuring that the FCC's guidelines were followed .

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THE COMMISSION MUST ORDER THE BOCS TO PAY REFUNDS

- As part of this supervisory role, the Commission must overrule inconsistent state rulings and order the BOCs to pay refunds.

  The Commission simply does not have the authority to "overrule" "inconsistent" state rulings and order the BOCs to pay refunds. When one considers the fact that all of the payphone orders, including the Wisconsin orders, recognized that state regulators were expected to apply their own costing methodologies (and not a federal costing methodology) in determining compliance with the new services test, it is clear that it would be difficult or impossible to determine just what an "inconsistent state ruling" was, and far more so to determine what the proper rate under the state interpretation of the new services test should have been if the FCC had stood in the shoes of the state regulators during the years that they were making the variety of rate decisions that the payphone providers now challenge.

  The FCC cannot legally order "refunds."

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THE WISCONSIN ORDER DOES NOT JUSTIFY REFUNDS

*"There is a significant doubt that either set of petitioners has suffered an injury sufficient to establish standing. The Commission made no determination as to the actual payphone line rate to be charged in Wisconsin or anywhere else. It did not 'review or evaluate' the Wisconsin BOCs' tariffs, but simply 'urge[d] the Wisconsin Commission to review its jurisdiction to apply the new services test.' Wisconsin Order Paragraph 66 . The order on review, in other words, did not establish a rate that is different from the rate already being charged in Wisconsin. It established only a standard under which BOC payphone line rates must be judged." **

In order to show injury, the BOCs would have to demonstrate that as a result of the order on review they must charge less for payphone line service than they otherwise would have. At this point, with no change in the existing rate having been ordered, such a showing would appear impossible to make. Indeed, the BOCs previously indicated to the Commission that their existing tariffs meet the new services test. . . . Nor can the Court presume an injury; the burden is on the petitioners to demonstrate one. The BOCs also lack standing to claim that they are entitled to have state agencies assess their tariffs under state established standards. A state regulatory agency would presumably have standing to press such a claim (and state agencies often do, see Illinois, 117 F. 3d 555). But in the absence of a rate differential the BOCs' own interests are not affected by the identity of the regulator.

** FCC Brief in New England Public Communications Council v FCC, pp17, 18.*

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THE WISCONSIN ORDER DOES NOT JUSTIFY REFUNDS

"The BOCs injury is both clear and immediate: The Order's forward-looking cost-based rate-setting methodology means that the BOCs cannot recover certain expenses beyond the current cost of providing service—namely, expenses owing to inefficiencies such as poor management or inflated capital and depreciation—that they could recover under a historical-cost method. . . . To comply with the Wisconsin Order, the BOCs will almost certainly have to modify their tariffs to lower their existing rates—or at the very least, refrain from raising their rates—before submitting their tariffs for state review."

New England Public Communications Council v FCC, 334 F. 3d 69, 74 (DC Cir. 2003).

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THE WISCONSIN ORDER DOES NOT JUSTIFY REFUNDS

The Wisconsin Order established guidelines under which states would be expected, in future payphone access line rate proceedings, to apply their own forward looking cost methodologies. It was never intended to establish a standard for federal evaluation of existing intrastate payphone access line rates, although, if state law so permitted, a state regulator could have commenced a proceeding at any time to determine whether new standards had been adopted and whether they should be applied to existing rates (as opposed to awaiting new tariff filings initiated by the BOCs). This is apparent from the language of the Wisconsin Orders and from the representations that the Commission made to the Court reviewing the first Wisconsin Order.

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